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No. 85-1940

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER
v.
CHEROKEE NATION OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CHEROKEE NATION IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable for a taking, under the Fifth Amendment, of fee simple lands of the Cherokee Nation held in trust for it by the United States.

PARTIES TO THE PROCEEDING

The Petitioner is the United States of America. The Respondent is the Cherokee Nation of Oklahoma.

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BRIEF OF THE CHEROKEE NATION IN OPPOSITION

The Cherokee Nation of Oklahoma, submits this brief in opposition to the United States of America's Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT

For centuries before the establishment of the United States of America, the Cherokee people lived on lands situated in the present-day states of Kentucky, Tennessee, North and South Carolina, Virginia, Alabama and Georgia. By 1700, the Cherokees controlled over 70,000,000 acres of hunting domain.

Then, beginning in 1785, the fledgling government of United States entered into a period of treaty-making with the Cherokees. Over the next 50 years, a series of

such treaties were negotiated in which the boundaries between the United States and the Cherokee Nation were repeatedly redefined. As white settlements grew in the eastern United States, the pressure to occupy Cherokee lands increased. In 1802, the State of Georgia and the federal government of the United States entered into an agreement known as the "Georgia Compact" in which the federal government promised to extinguish Indian title to certain Cherokee land within that state, even though no procedure was ever specified for accomplishing this task.[1]

By 1817 a treaty was signed which caused a number of Cherokees to exchange their lands in Georgia for equal portions within the Arkansas Territory.[2] However, since the majority of the Cherokees remained east of the Mississippi River at this time, in the eyes of many the "problem" of dealing with these sovereign people called Cherokees persisted. With the election of Andrew Jackson in 1828, it soon became evident that the Indians would be forcibly removed to the West.

Further encroachment of white settlers in Arkansas eventually prompted another treaty in 1828, wherein Cherokee lands in Arkansas were to be exchanged for over seven million acres of land in Indian Territory, now the State of Oklahoma and an outlet to the West.[3] Therein the United States "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged." (*id.* Art. 2) The intent of the parties is apparent even today:

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1. 28 Am.St. Papers, Public Lands Vol. 1, 7th Cong., 1st Sess. 125 (1802)

2. Treaty with the Cherokees, July 8, 1817, 7 Stat. 156, 2 Kapp. 140

3. Treaty with the Cherokees, May 6, 1828, 7 Stat. 311, 2 Kapp. 288

> . . . a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever - a home that shall never, in all future time, be embarrased by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, . . . (*id.* at preamble)

On May 28, 1830, Congress passed the Indian Removal Act. ch. 148, 4 Stat. 411, which authorized the President to exchange territory west of the Mississippi River for the eastern lands of Indian tribes including the Cherokee Nation. Federal protecton was withdrawn in the east and the States of Georgia, Mississippi and Alabama extended their laws over Cherokee domains. The United States refused to intervene. See, *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 642-643 (1970). The Georgia legislature passed certain laws having the effect, if not the design, of harassing the Cherokees. [4]

In 1833 the United States settled a boundary dispute between the Cherokees and Creeks relative to their western domains and again "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby pledged, ..." Treaty with the Western Cherokee, Art. 1, February 14, 1833, 7 Stat. 414 , 2 Kapp. 385.

In 1835 the United States imposed upon the Cherokee Nation the Treaty of New Echota. [5] By the terms of this

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4. Georgia law abolished Cherokee government, extended its laws over Cherokee domain, and distributed Cherokee lands among five Georgia counties. *Compilation of Laws of the State of Georgia* (1819-1829) 198 (Dawson 1831)

5. Treaty of New Echota, December 29, 1835, 7 Stat. 478, 2 Kapp. 439.

treaty, the Cherokee ceded to the United States all their remaining lands in the east, and agreed to remove to and unite with the western Cherokees on lands described in the treaty. The United States agreed that the Cherokee Nation would have the right of self-government within its domain, and that its western domain would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory." (*id*. Art. 5) The United States further promised that the Cherokee would "be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States." (*id* Art. 6) The treaty reserved only:

> . . . the right to make and establish such post and military roads and forts in any part of Cherokee country, as they may deem proper for the interest and protection of the same . . . provided that if the private rights of individuals are interferred with, just compensation therefore shall be made.

Id. Art. 3.

This series of treaties culminated in a patent from President Martin Van Buren on behalf of the United States granting fee title to the Cherokee domain in Indian Territory in 1838. (Appendix A) The patent conveyed over fourteen million acres of land in the northeastern quadrant of what is now the State of Oklahoma and provided that the Cherokee Nation, "HAVE AND HOLD THE SAME...FOREVER." (*ibid.*) The patent expressed the following reservations:

> (1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turned out to be within the bounds of these Cherokee lands; (3) the right to establish and maintain military posts and roads together with the free use of land, timber, fuel, and materials for the construction and support of those facilities . . .

Choctaw Nation v. *Oklahoma*, 397 U.S. 620, 636-637 (J. Douglas concurring) (1970)

Eventually the new domain in the west was surrounded by white settlements and the United States attacked "as absurd" the Cherokee treaties and the solemn guaranties contained therein that the western Cherokee domain "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory," and the right of the Cherokee Nation to self-government under its own laws. *Id.* at 640-641.

In 1893 Congress appointed the Dawes Commission to effect the extinguishment of tribal title and enable the ultimate creation of a state. Act of March 3, 1893, ch. 209, 27 Stat. 612, 645. But, the commission found tribal members generally reluctant to accede to the wishes of the government. *Seminole Nation* v. *United States*, 102 Ct.Cl. 565, 628-629 (1945).

So, Congress next passed the Curtis Act[6] directing the allotment. Cherokee lands were ultimately alloted in 1902 to individual members of the tribe and the United States assumed full administrative control over the property and affairs of the Cherokee Nation.[7] The bed of

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6. Act of June 28, 1898, ch. 517, 30 Stat. 495; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306-308 (1902)

7. Cherokee Agreement of July 1, 1902, 32 Stat. 716.

the Arkansas River remained unalloted and was held in trust by the United States for the Cherokee Nation. [8]

A dispute arose shortly after Oklahoma became a state, wherein ownership of the riverbed was questioned The Secretary of Interior erroneously concluded title had passed to Oklahoma at statehood pursuant to the so-called "Equal Footing Doctrine". [9] This erroneous conclusion was affirmed in various Oklahoma Supreme Court cases from shortly after statehood (1907) through 1940's. [10] While the Cherokees continued to assert title, it was not until 1966 when Oklahoma agreed to waive sovereign immunity that the issue was submitted for a judicial determination.

In 1966 the Cherokee Nation sued the State of Oklahoma for an accounting for the income it was receiving from oil and gas development of the Arkansas riverbed within its domain. The State answered waiving its immunity and asking federal district court to quiet title to the riverbed in it under the Equal Footing Doctrine. The Choctaws and Chickasaws intervened with like claims.

Following adverse decisions in both the district court and the court of appeals, this Court reversed, holding that the Cherokee, Choctaw and Chickasaw Nations were the joint owners of the riverbed and that the United States had ceded the tribal titles to their

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8. *Choctaw Nation*, 397 U.S. at 628; *Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674, 677 (1972), cert. denied, 409 U.S. 1039.

9. Letter dated March 26, 1908 from acting Commissioner of Indian Affairs, Honorable C.F. Larrabee, to the Secretary of Interior, Honorable Jesse E. Wilson. Approved March 27, 1908.

10. *State of Oklahoma* v. *Nolegs*, 40 Okla. 479 (1914); *Vickery* v. *Yahola Sand and Gravel Company*, 12 P.2d 881 (1932); *Lynch* v. *Clemants*, 263 P.2d 153 (1953).

respective domains in present Oklahoma to the tribes by the treaties of the early nineteenth century and later confirmed by patents which included the subject riverbed. [11]

On remand the State was not satisfied with the district court determination that the tribes held present title. But, the issue was affirmed by the court of appeals and certiorari denied by this Court, December 4, 1972. [12] On second remand the district court approved an accounting by the State regarding leasing income. The court of appeals affirmed and certiorari was again denied by order of June 10, 1974. [13] Thereafter, a special three judge panel decided a collateral dispute between the Cherokees and the Choctaws and Chickasaws regarding the lower region of the riverbed. The panel determined that the Cherokees held title to the north half of this portion. [14]

During the years 1973, 1974 and 1975, Congress appropriated the sum of $440,000.00 and ordered the Department of Interior to do a complete appraisal and evaluation of this property. The appraisal, which determined the total value of the riverbed itself to be $177 million was completed in 1975 and accepted by the tribes. [15]

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11. *Choctaw Nation*, 397 U.S. at 633-635.

12. *Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674, 678 (1972) cert. denied, 409 U.S. 1039 (1974).

13. *Choctaw Nation* v. *State of Oklahoma*, 490, F.2d 521, 527 (1974) cert. denied, 417 U.S. 946 (1974).

14. *Choctaw Nation* v. *Cherokee Nation*, 393 F.Supp. 224, 246 (E.D. Okla. 1975)

15. This figure is the compilation of various reports conducted by independent contractors under contracts with the Bureau of Indian Affairs. The Tribes did not participate in the selection of these contractors. An additional study was completed in 1984 by W.R. Holway and Associates based on fair royalty value. The entire royalty value is estimated to be $108 million of which the Cherokee interest is approximately $60 million.

In 1976 the Cherokees were invited by the Secretary of Interior to settle a claim of sand and gravel deposits lost during construction of the navigation system. The Cherokees were advised that it would be in the best interests of the United States if the tribe would sell all of its mineral interest to the government so that future production would not interfere with the navigation way. An agreement was drafted with the help of the Solicitor and submitted but rejected by a new Secretary of Interior on grounds that he lacked authority to enter the agreement without congressional approval.

Thereafter, with assistance from the Department of the Interior, a congressional delegation drafted Senate Bill 660 and companion House Bill 4377, 95th Congress, 1st Session, to authorize the Secretary of Interior to enter into agreements with the three tribes for the use, lease or purchase of this property. Surprisingly, the representative from the Department of the Interior announced at a Senate hearing on this bill that legislation was not necessary and that the department would prefer to negotiate.[16]

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16. *Arkansas Riverbed Rights of Cherokee, Choctaw and Chickasaw Nations: Hearing before the United States Senate, Select Committee on Indian Affairs*, May 25, 1977, p. 24:

> CHAIRMAN ABOUREZK. In your opinion is it the usual practice for the Corps of Engineers to compensate tribes without congressional authority, or should they have congressional authority? What is your view of that?
>
> MR. BUTLER. Mr. Chairman, it is my understanding that under the theory of navigational servitude, I am advised that it is not a legal base for compensation.
>
> I would, however, Mr. Chairman, like to point out that there has been ample precedent, in my judgement, for compensation of this type relative to, let's say, the Missouri River basin, the Pick-Sloan plan which compensation was provided to the Indian owners of the inundated lands under the Celillo Falls inundated of the Columbia River. There are two examples to my knowledge of the power

Pending enactment of Senate Bill 660, there was a second attempt to settle with the Cherokees for their interest in the destroyed sand and gravel deposits. On November 4, 1977, the Assistant Secretary for Indian Affairs, proposed a settlement agreement wherein the United States would pay $8,453,818.88 representing the royalty value of the Cherokee interest in that portion of those minerals taken or destroyed. The Cherokee Tribal Council approved and returned the agreement on January 14, 1978. The Cherokees were later advised that Interior would not sign this agreement.

Ultimately, the Senate and House legislation was not passed. However, Congress did grant the district court for the Eastern District of Oklahoma jurisdiction to hear all claims of the Cherokee Nation against the United States for damages under the broad jurisdictional provisions of the Indian Claims Commission Act, ch. 959,

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head compensation and the Yellow Tail Dam for the Crows, and for the Kerr Dam at the Flathead Reservation both in Montana. This is the Federal Power Commission Act.

CHAIRMAN ABOUREZK. Without authorization?

MR. BUTLER. No; that is with authorization.

CHAIRMAN ABOUREZK. So it is a practice to have authorization; is that right?

MR. BUTLER. Yes; there is ample precedent.

CHAIRMAN ABOUREZK. When did the Interior Department decide that legislation would not be necessary?

MR. BUTLER. With specific respect to S.660?

CHAIRMAN ABOUREZK. Yes.

MR. BUTLER. About 7 o'clock last night. I will be very candid with the committee. (laughter)

60 Stat. 1049-1050 resulting from construction of the navigation system.[17] (Appendix B)

The Cherokee Nation filed its Complaint on May 23, 1983, alleging that construction of the McClellan-Kerr Navigation System had created a loss of tribal assets in the Arkansas riverbed, held in trust by the United States for the nation of Indians, and constituted a taking of assets by the United States under the Fifth Amendment to the Constitution of the United States; a violation of its fiduciary relationship with the Cherokee Nation and a violation of the fair and honorable dealing clause of the Indian Claims Commission Act. (Appendix C). The United States answered that it had a navigational easement in the Cherokee domain, in the exercise of which no taking occured.

The district court ordered cross-motions for summary judgment considering (1); "Whether the United States navigational servitude in the Arkansas River prevents liability for an alleged taking of land held in fee by the Cherokee Nation?" and (2); "Whether the exercise of a navigational servitude constitutes the breach of some duty of care to plaintiff?"[18] (Petition App. 25a). The court found in favor of the Cherokees on the first issue and reserved ruling on the second, certifying the case for interlocutory review.

The court of appeals granted the petition of the United States and affirmed the district court on different grounds. The court disagreed with the lower court, holding that it was not necessary to reserve the servitude in the patent but holding nevertheless that

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17. Act of December 23, 1982 (Public Law 97-385, 97th Cong.) 96 Stat. 1944.

18. Section 2 Clause 5 authorizes adjudication of claims that are not recognized by any existing rule of law or equity. *Osage Nation* v. *United States*, 119 Ct. Cls. 592, 670-671, 97 F.Supp. 381 (1951) cert. denied, 342 U.S. 896; *United States* v. *Oneida Nation*, 217 Ct. Cls. 46, 65 (1978), 576 F.2d 870.

compensation is due for taking of the tribe's fee title, recognizing the uniqueness of the historical relationship of the parties and the fiduciary responsibility of the United States toward the Cherokee people.

ARGUMENT

1. The Decision Below is Correct;

The United States complains that the court of appeals decision "drastically alters the character of the navigational servitude," reducing it to "a mere right to ply the waters of navigable streams," that the "practical ramifications are serious," which "will expose the public fisc to multi-million liability," and "encourage similar suits by both Indian tribes and private parties, demanding comparable damages awards." (Petition p. 9).

The court of appeals has already answered these unreasonably alarming contentions (Petition App. 15a); "Yet, from all we have said, it should be clear the result here is tied to and limited by the unique circumstances of Cherokee history and the terms of the treaty patent." The decision of the court of appeals does not have broad application. It is unique to the circumstances present in this case. It is the law governing this case, and as such refutes the petitioner's assertions of broad "ramifications".

This Court has already distinguished this case from other cases, and pointed out the limited application of the decision. In *Montana* v. *United States*, 450 U.S. 544, 555-556 (1981), (footnote 5), this Court stated:

> Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

The decision in this case is limited exclusively to three of the Five Civilized Tribes: The Choctaw and Chickasaw Nations, and the Cherokee Nation, all of which were parties in *Choctaw Nation.*[19] All of the Five Civilized Tribes had similar treaty provisions granting fee title. The several patents issued to these tribes granted to them this fee simple title to their western domains, instead of the usual right of use and occupancy where fee title remained in the United States. Each of these tribes was also under the guardianship of the United States, wherein the United States owed a fiduciary duty to protect their tribal interests.[20]

Petitioner claims that the court of appeals relied on factors that are not relevant to a taking analysis. However, the existence of these factors between the United States and the Cherokee people, fee simple title in the Cherokees, the existence of vested treaty rights, and the fiduciary relationship in light of special historical circumstances unique to this case, cannot now be disregarded.

The facts are clear from the record. The Cherokee Nation received a fee simple absolute title directly from the United States by patent therefore no state rights are involved. The grant was made almost 70 years before Oklahoma joined the Union. The so-called "Equal Footing Doctrine" has no application here. Petitioner cites distinguishable cases where title passed through states of the union to ultimate riperian owners.[21] In

19. In *United States* v. *Hayes*, 20 F.2d 873, cert. denied, November 21, 1927, 275 U.S. 423, it was factually determined that the Arkansas was not navigable in the Creek Nation. The Canadian River runs through the Seminole Nation and is not considered navigable.

20. See, *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935); *Choctaw Nation*, 397 U.S. at 627.

21. *United States* v. *Chicago, Milwaukee, St. Paul and Pacific R.R.*, 312 U.S. 592, 596 (1941); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 60-61 (1913)

these cases the parties did not take title directly from the United States coupled with the promise that their lands would forever be free from state or territorial jurisdiction as did the Cherokees.

The element of fee title cannot be examined without considering treaty rights and the fiduciary relationship of the parties as the Petitioner would have this Court do. These three tribes have a vested property right in the banks and bed of the Arkansas River within their respective domains, held in trust for them by the United States. The court of appeals deferred to the emphasis that this court has already placed on the special circumstances surrounding these treaties coupled with certain well established rules governing interpretation of those rights. Surely the Cherokees did not believe that the United States intended to establish a public highway through their new nation when intruders were to be kept out by order of the President himself? *Choctaw Nation*, 397 U.S. at 630-631; *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). The very purpose of these treaties would be compromised if valuable tribal assests belonging to the Cherokee Nation were allowed to be taken without compensation. Treaties with Indians must be interpreted to carry the full intention of Congress behind the grant.[22] Care must be taken to preserve property rights created thereby. Can Petitioner today apply the navigational servitude without compensation and ignore these rights?

Neither is the court of appeals' reliance upon the trust relationship between the United States and Cherokee people "misplaced" as Petitioner asserts. To ignore this status would deny the established obligation of the

22. "The language used in treaties with Indians should never be construed to their prejudice." *Squire* v. *Capoeman*, 351 U.S. 1, 7 (1956) citing *Worcester* v. *State of Georgia*, 6 Pet. 515, 582 (1832); "...that language is 'to be liberally construed, doubtfull expressions being resolved in the favor of the Indian's"; *Moore* v. *United States*, 157 F.2d 760, 762 (9th Cir. 1946) citing *Alaska Pacific Fisheries*, 248 U.S. at 89.

United States as previously declared by this Court. The applicable law is well settled by this Court in *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935).

> . . . The tribe was a dependent Indian community under the guardianship of the United States, and therefore, its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, *it was subject to . . . pertinent constitutional restrictions.* It did not enable the United States to give the tribal lands to others, *or to appropriate them to its own purposes,* without rendering, or assuming an obligation to render, just compensation for them; for that *"would not be an exercise of guardianship but act of confiscation". Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 307-308. (emphasis ours).

This Court has also recognized that in carrying out its treaty obligations with Indian tribes, the dealings of the United States are to be judged by "the most exacting fiduciary standards," quoting from *Meinhard* v. *Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546, the classic definition of the fiduciary relationship by Chief Judge (later Mr. Justice) Cardozo. *Seminole Nation* v. *United States,* 316 U.S. 286, 296-297 (1942).

Both the navigational easement and the power to regulate Indian affairs have their origin in the same provision of the United States Constitution. Article 1, Section 8, provides that Congress shall have the power:

> (3) To regulate Commerce with foreign nations, and among the several States and with the Indian Tribes...

In *Creek Nation* v. *United States*, 78 Ct. Cls. 474 (1933), at p. 485, the court of claims held:

> That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294; *Lone Wolf* v. *Hitchcock*, 187 U.S. 533...

This power is not absolute, but subject to "pertinent constitutional restrictions". *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935); *United States* v. *Cress*, 243 U.S. 316 (1916).

In this case, the court of appeals held, consistent with *Choctaw Nation*, that although the navigational easement was not expressly reserved in the Cherokee patent, the power to exercise it existed, but:

> When the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due. *The navigational servitude is not without constitutional limitation.* Furthermore, if Indian property is taken for non-Indian use within this context,constitutional strictures are equally applicable.(emphasis ours) (Petition App. 10a).

This Court has also recognized that the navigational easement is not absolute. Petitioner admits this (Pet. 10-11). *Kaiser Aetna* v. *United States*, 444 U.S.164, 175 (1979):

> . . . this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated

> by the government, rather than remain disproportionately concentrated on a few persons."

Kaiser Aetna cites *Penn Central Transportation Co.* v. *New York City* 438 U.S. 104, 124 (1978)

Thus the court of appeals decision herein is based upon law already established. No new law is involved here, no conflict of decision is present, and no far-reaching precedent is established in this case. The decision merely holds that this private property which is held in trust by the United States for the Cherokee Nation subject to the unique historical relationship of the parties, cannot be taken without just compensation, regardless of the navigational servitude. As the circuit court stated: "Whatever other actions our holding might generate cannot preclude a just result in this case." (Petition App. 15a).

In his concurring opinion in *Choctaw Nation*, 397 U.S. at 643, Mr. Justice Douglas concluded:

> Only the continuation of a regime of discrimination against these people, which long plagued the relations between the races, can now deny them this just claim.

The petitioner alarms the Court with a claim of the Colville tribe for damages of more than $130 million based on the United States construction of the Grand Coulee Dam on the Columbia River, citing *Confederated Colville Tribe of the United States*, No. 181-D (Claims Ct.) 39 Ind. Cl. Comm. 159 (1979). A reference to 39 Ind. Cl. Comm. 159 discloses that this was merely a proceeding on a motion of the Colvilles dated November 18, 1976 to amend the original petition, filed before the Commission on July 31, 1951, to separate the Grand Coulee Dam claim from other claims, and give it a

separate docket number 181-D. The Commission allowed the motion on November 18, 1976, 39 Ind. Cl. Comm. 166. No support for the statement that this claim involved $130 million was found, and this conclusion of the Petitioner is wholly unsupported by the record cited. This case of the Colvilles relates to the Columbia River and the State of Washington. Moreover, no "peculiar circumstances" are cited which are in any way similar to the Cherokee Treaties and patent issued thereto and involved in the Cherokee proceedings. This case had its beginnings even before *Choctaw Nation* in 1966. Certainly counsel, unfamiliar with the issues in the Colville case, should not be required to try that case in the present proceeding, the Colville case being wholly irrelevant, incompetent and immaterial to the issues in this Cherokee case.

Petitioner further states "the Department of the Interior believes that at least 12 other Indian tribes have substantial claims to ownership of lands beneath navigable waters, and consequently, could assert claims against the government for damage caused by navigational improvements." (Petition p. 19). Certainly counsel cannot in this litigation be concerned with any claims that "could" be asserted against the government. The present proceeding remains unique, in that only three of the Five Civilized Tribes, the original parties to *Choctaw Nation*, and owners of the fee simple title to the Arkansas riverbed in Oklahoma under the "peculiar circumstances" set forth in their respective treaties, can benefit from this present proceeding. Counsel for petitioner advanced similar statements before the court of appeals which answered succinctly:

> The government finally warns that if we affirm the district court, we give leave to untold numbers if tribes seeking compensation for

similar activity on waterways in their lands. Yet, from all we have said, it should be clear the result here is tied to and limited to the unique circumstances of Cherokee history and the terms of the treaty patent. Whatever other actions our holding might generate cannot preclude a just result in this case.

The government asks us to disregard the absolute grant in the treaty, the rules of construction of treaties, and the trust relationship, each a separate check on Congressional power, to hold that the navigational servitude represents a preemptive power exempting it from liability. This we cannot do. We do not question the exercise of the navigational servitude to improve the navigation in the Arkansas River. We do question the impact of that exercise on the subservient property. We hold the navigational servitude does not exempt the United States from liability for the alleged taking of tribal property.

Cherokee Nation of Oklahoma v. *United States*, 782 F.2d 871, 879 (10th Cir. 1986).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

James G. Wilcoxen
General Counsel for the Cherokee Nation

Paul M. Niebell
Counsel for the Cherokee Nation

APPENDIX A

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians**it was stipulated and agreed on the part of the United States, ** the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are** in the words following, that is to say:-

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three,** the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians,** SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits** the right is reserved to the United States to

permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS** hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land;**

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fourteenth, one thousand eight and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty.*

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may

deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall be made."-

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square** on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river;** thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas,** thence south fifty three degrees west, one mile, to a post** thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock** thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, *** thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of

the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the southwest corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high**thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river;** thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square** thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square** thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.-

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof**

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said

Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extend and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President — M. VAN BUREN

M.M. GARLAND
Recorder of the General Land Office

APPENDIX B

PUBLIC LAW 97-385-DEC. 23, 1982

Public Law 97-385
97th Congress

An Act

Conferring jurisdiction on certain courts of the United States to hear and render judgment in connection with certain claims of the Cherokee Nation of Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That (a) notwithstanding section 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946, as amended (the Indian Claims Commission Act, 60 Stat. 1049, 1052; 25 U.S.C. 70k), jurisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Oklahoma, to hear, determine, and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commision Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and powerheads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation; and also on any claim which the Cherokee Nation of

Oklahoma may have against the United States resulting from any action under section 14 of the Act of April 26, 1906 (34 Stat. 137, 142), wherein the United States gave away to third parties lands for what are known as station grounds of railroads, said lands being segregated from Cherokee Nation tribal lands without compensation to said Cherokee Nation of Oklahoma therefor; all of said lands or interests therein being held by said Cherokee Nation by virtue of treaties and by patent issued by the United States granting said lands to said Cherokee Nation in fee simple, or otherwise.

(b)Notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act approved August 13, 1946 (25 U.S.C. 70k), the Court of Claims or the United States District Court for the Eastern District of Oklahoma shall have jurisdiction to the same extent as under subsection (a) of this Act to hear, determine, and render judgement on any claim of the Choctaw Nation and on any claim of the Chickasaw Nation against the United States for any damages to any tribal assets, lands, or interests of such Nations arising from the actions of the United States described in such subsection.

Approved December 23, 1982.

APPENDIX C

(CHAPTER 959)

An Act

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

JURISDICTION

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of

cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

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